No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICUS CURIAE* ONLINE MERCHANTS GUILD IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the Online Merchants Guild, a collection of merchants that sell goods via websites such as Amazon.com ("Amazon"), eBay.com, Walmart.com, and Etsy.com.[2] *Amici* submit this brief in support of Respondents, as the physical presence rule is the last bastion of defense any small business has against Petitioner[3], whose contradictory actions over the last

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[1] This brief is filed pursuant to the parties' blanket consent. No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief.

[2] *Amici* Curiae wish to inform the Court that, conservatively, hundreds of thousands of online merchants are businesses owned by members of a protected class and are at risk of being forced to shut down due to actions presently taken by Petitioner that contradict their key arguments made to this Court. We request that the Court consider an appropriate level of scrutiny with respect to the statements contained herein, in light of the resulting disparate impact Petitioner's action has had, and will continue to have, on online merchants currently in business, and the future entrepreneurs who will no longer be able to thrive as a result of Petitioner's actions.

See e.g. "'We're in the middle of a black entrepreneurship renaissance fueled by the internet and ecommerce,' Congresswoman Robin Kelly (D-IL), co-Chair of the Diversifying Tech Caucus, said. 'Companies like Amazon have reduced the barrier to entry and made it easier to sell goods, products and services online. And black entrepreneurs have taken advantage of this opportunity and are chasing their dreams.'" goo.gl/crkigK

See also "More women in the U.S. and foreign countries are starting their own e-commerce businesses through websites like Amazon, Alibaba, Etsy and personal websites." https://goo.gl/f4ynZr

[3] Although South Dakota is the sole Petitioner in this case, South Dakota is a representative member of a group of dozens of homogeneous states, all sharing identical motivations and goals. In this brief, reference to the Petitioner, can be read to include reference to all other states that have taken action or will act to

ten years, particularly with respect to one company, Amazon, have directly caused the devastating consequences that Petitioner highlights. It is the Petitioner and like states, and not the Constitution or any ruling of this Court, that is responsible for lost tax revenue and the tilted playing field in favor of select online retailers over bricks and mortars. It was and still is within the power of the Petitioner and like states to enforce the existing laws in a consistent manner and stop offering select retailers the opportunity to operate "duty-free" in exchange for the promise of jobs and capital investments.

Amici Curiae are the merchants that are, presently, real world victims of the Petitioner's gross misstatements, misrepresentations and malicious claims. These are the small business merchants who use Amazon's fulfillment and logistics services in order to have their products sold on Amazon's retail platform. These merchants have been victimized by the Petitioner's continual lowering of the bar of constitutional decency. The scare tactics have worked; at least one million individual merchants are weighing whether it is a sound business decision to continue engaging in interstate commerce with the fear of state's threatening of financial ruin and even jail time. As a result of the Petitioner's absurd interpretation of physical presence, and a clear disregard for undue burdens on interstate commerce, these *amici* are a dying breed.

Amici Curiae are also those merchants who will become the next wave of real world victims should a decision be rendered in favor of the Petitioner, as it is these merchants that have narrowly escaped the

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indiscriminately inflict the devastating consequences later discussed in this brief on the *amici* and the *amici*'s community.

states' cruelty thus far due to their lack of so-called physical presence, because they do not utilize the Amazon logistics and delivery services. These are the small business merchants whose products are sold on retail platforms such as Amazon, eBay, and Etsy, but who ship and fulfill orders from their own locations; typically their home. Left to the Petitioner's own devices and discretion, the Petitioner will now be free to apply the same destructive tactics it is currently using against the merchants using Amazon fulfillment services, by placing the same unconstitutional burdens on the merchants of the remaining small business owners that do not.

Amici's interest in this case is survival. The *amici* are the merchants that cannot withstand the compliance demands of over ten thousand sales tax jurisdictions and the even more burdensome income tax compliance obligations, a burden that the Petitioner is fully aware of but are deliberately leaving out of this case. The *amici* will simply not be able to meet the $100,000, or more, annual cost of compliance. Knowing that *amici* are the most vulnerable, the Petitioner strategically brought this case against the Respondents, and in doing so sought to avoid being perceived as the ruthless Goliaths they are to over two million online merchant businesses worldwide. As *amici* will show, Petitioner's supposed selfless attempts to save brick and mortar retailers and avoid placing undue burdens on interstate commerce are, to put it mildly, not true.

STATEMENT

I. AS PETITIONER AND ITS AMICI MAKE STATEMENTS TO THE CONTRARY, THEIR PRESENT ACTIONS TOWARDS ONLINE MERCHANTS PROVE THERE IS NO REGARD FOR BURDENS PLACED ON INTERSTATE COMMERCE.

To truly grasp the extent of the Petitioner's mistruths, the decade long relationship between the Petitioner and its *amici*, and retail giant Amazon, must be provided as context. Therefore, just as the Respondent stated in its reply brief, "an extended statement is required to set the record straight."

To provide appropriate context for its support of the Respondent, *amici* must recount the unconstitutional nightmare that is the reality for hundreds of thousands of online merchants, most of which are home based businesses. Petitioner and its *amici* are hunting down merchants for taxes that according to state statutory law or the United States Constitution, are not due. Despite statements made to the contrary by the Petitioner to this Court, states are driving online merchants to their breaking points, pushing them to make drastic and unsound business decisions purely out of fear that the taxmen cometh. Thankfully, the Petitioner did not wait until after the Court rendered a decision to begin its witch-hunt; had the states held off, *amici* would not be able to enlighten the Court of Petitioner's blatant misrepresentations.

Over the last year, the states have ramped up their enforcement efforts with harassing letters, emails and phone calls to remote small business online merchants that go as far as threatening incarceration for the failure to comply with sales tax demands. California

has employed a task force of call center representatives, all with minimal tax training, to bombard the landlines and cell phones of small business online merchants with the sole purpose of bringing the merchants "into compliance" and pitch a deal for cooperation that, surprise surprise, includes the merchants' having to estimate and pony up six years of back taxes. The Multistate Tax Commission ("MTC") is no better, having facilitated an "amnesty" program that injected fear and created the false hope for businesses of all sizes; a promise of amnesty for up to ten years of back taxes. In reality, the MTC program was a trap for the unwary home-based business owner, leading to a multistate sales and income tax compliance obligations that even the most sophisticated of businesses struggle to comply with; requiring the support of countless accountants and lawyers, something no small business could ever afford.

The facts above are undeniable. Yet the Petitioner and its *amici* have presented a series of deliberately misleading statements claiming they can administer taxes on remote vendors without unduly burdening interstate commerce, purposefully omitting those facts that show the Petitioner and its *amici* already have burden free means of accomplishing those goals but have chosen not to pursue such means for nefarious reasons. Petitioner and its *amici* already have access to a simplistic statutory remedy to collect the tax that does not involve this Court's intervention; one that's even been implemented by Washington State.[4] However, Petitioner has chosen to hide that possibility from the Court due to a continuous dysfunctional

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[4] On January 1st, 2018, a Washington statute requiring Amazon to collect tax on all of its sales, including marketplace sales, went into effect.

relationship Petitioner and its *amici* have developed with Amazon, over the last ten years.

Petitioner has placed unbearable burdens on hundreds of thousands of small online merchants, worldwide, who use Amazon's platform. Such burdens may have been constitutionally tolerable at a time when access to the global economy was limited to multi-billion-dollar enterprises. However, the realities of 1992 are not the same as the realities of 2018. Enterprises that have full access to the global economy no longer need substantial capital investments and operations worldwide. Now, individuals located anywhere in the world can easily offer their products on a global scale, with merely a laptop. For today's online merchant can go from an idea to production to selling in a global marketplace in a matter of a few months and with only a few thousand dollars of starting capital. This revolutionary change in accessibility to the global economy has resulted in an explosion of entrepreneurship worldwide and has granted unprecedented freedom to the hundreds of thousands of people who no longer have to be tethered to a city in order to make a living.

Petitioner, on the other hand, refuses to adapt to these changing times. Petitioner sees no reason to distinguish a home-based business who can now sell globally, from a Fortune-Fifty enterprise. No matter how dramatically things change, the Petitioner is always going to act as if it is innovation's responsibility to absorb the burden at all costs, and never the Petitioner's responsibility to adapt to innovation. Compliance at all costs will always be the mantra of the Petitioner and its *amici* who have time and time again showed zero regard for the burdens they place on interstate commerce with their draconian

compliance and enforcement methods. As we stand at the forefront of the next evolutionary wave of commerce, Petitioner holds on for dear life in order to keep things the way they were, instead of embracing the way things could be.

These dire consequences are not unknown to the Petitioner. To the contrary, members of the *amici* community recently spoke directly to the Petitioner and its *amici* about these ramifications, hoping it would spark an amicable dialogue to work on a modern solution to their 25-year old problem. During an MTC meeting regarding the Online-Marketplace Seller Voluntary Disclosure Initiative, the MTC was required to offer public comment, during which online merchants asked the states to explain why they were fixated on imposing individual tax compliance burdens on over two million online merchants, when they could have much more efficiently imposed that burden on Amazon.[5] Despite this being the first time states had an opportunity to address members of the online merchant community, the opportunity was met with a chilling silence. To be fair, burdens were addressed during the MTC meeting, just not the online merchants' burdens. It was the burden of MTC amnesty facilitator, Richard Cram, that the states were concerned about, as he was overwhelmed by the hundreds of applications he was trying to process. Fortunately for Mr. Cram, the hundreds of thousands of businesses, of all sizes, that the MTC "invited" to participate in the program saw their "sham-nesty" program for what it was, saving the MTC from having a truly impossible compliance burden placed upon them. Thankfully, the entire MTC teleconference was

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[5] Audio available at https://www.youtube.com/watch?v=2fw8A8CDo6U.

recorded and subsequently posted to YouTube so that now, for the first time in the history of our nation, there is an audio recording of states caught in the act of unconstitutionally burdening interstate commerce.[6]

II. PETITIONER'S CHOICE TO FOCUS ON RESPONDENTS WAS STRATEGIC TO DIVERT THE COURT'S ATTENTION AWAY FROM THEIR TRUE TARGET: ONLINE MERCHANTS.

The Petitioner has stepped carefully and strategically to be before the Court and has identified and targeted the perfect Respondents. *Quill v. North Dakota*, 504 U.S. 298 (1992), teaches that the Court will not uphold state action that unduly burdens an industry as organized and sophisticated as the catalog industry. Therefore, the Petitioner could not have aimed its sword at small business owners that work from their homes; the Petitioner had to attack an adversary even more established today than the catalog industry was in 1992. Never mentioning who it is truly after, the Petitioner is attempting to convince the Court of its right to tax big online business on Constitutional grounds. In reality, the Petitioner will apply a holding in its favor to small business online merchants, as is evidenced by the fact that the Petitioner and its *amici* are currently doing it, while making statements to the contrary to this Court. Petitioner and its *amici* are fully cognizant of the optics and resulting fallout of a case in which the states seek permission to place undue burdens on a worldwide community of home-based businesses. Aware of the history of the Court's decisions regarding states' interference with interstate commerce, Petitioner

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[6] *Id.*

brought the case that it believed it could win, with Respondents who would garner little sympathy, and hoping that their true motivation would remain concealed.

One need only look at the numbers and see how the online merchant community's sales far surpass the Respondents, to see Petitioner's hidden agenda. According to Credit Suisse, the estimated annual revenue of third party merchants, for products sold on Amazon alone, account for approximately $135 Billion of goods sold in ecommerce.[7] For the same reason the Petitioner did not include Amazon merchants – perception - it also strategically chose not to include eBay merchants, whose community of predominantly small business online merchants are responsible for approximately $83 Billion of goods sold in ecommerce.[8] On these two platforms alone, small business merchants drive over $200 Billion of ecommerce sales per year. The Respondents, on the other hand, collectively, reported a total of approximately $10.95 billion of ecommerce sales, less than 5% of *amici* and its community of online merchants sales. While tax on $10.95 billion would surely help with budget shortfalls, tax on Amazon and eBay sales would do a

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[7] https://www.entrepreneur.com/article/303532

[8] "Total marketplace volume per eBay http://files.shareholder.com/downloads/ebay/6169581134x0x970140/C1C54245-B6C1-4344-8428-5251DADBBDB7/EBAY_News_2018_1_31_Earnings.pdf; Newegg sales discussed in Forbes Magazineavailable at https://www.forbes.com/sites/ryanmac/2013/06/19/geek-favorite-electronics-retailernewegg-hatches-new-billionaire-on-rising-sales/#2a99eef13d15; Overstock annual sales available at https://www.nasdaq.com/symbol/ostk/financials?query=income-statement; Wayfair total sales available at https://investor.wayfair.com/investor-relations/press-releases/press-releases-details/2018/Wayfair-Announces-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx.

whole lot more towards balancing state budgets. The truth is that this case is not about Petitioner's ability to compel the Respondents to collect and remit sales tax. It is about allowing the states the right to compel the Respondents and *amici*, while at the same time giving the states the option to continue to pretend that the biggest potential revenue source, Amazon, is not required to do the same, since they are merely a marketplace.

SUMMARY OF THE ARGUMENT:

1. Physical presence is not the barrier Petitioner claims it to be, therefore this matter should not be before this Court. Petitioner and its *amici* have grossly exaggerated the harms it suffers as a result of *Quill*, while diverting this Court's attention away from the harm it causes and will continue to cause should this Court rule in its favor. Petitioner has crafted an enticing opportunity to challenge *Quill*, yet this case has nothing to do with the legitimacy of the physical presence standard. The state's story of loss and hardship is just that, a story. In reality, South Dakota and its *amici* already have constitutionally sound laws in place[9] that allow them to collect all of the revenue

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[9] *See supra*, note 3, Amazon's nexus in all jurisdictions places no restriction on any state to require Amazon to collect use tax. For other large ecommerce businesses whose nexus may not be as apparent, Petitioner has a remedy, one that was proven to be effective against Amazon. In the NY Court of Appeals ruling against Amazon, *Amazon.com LLC v. New York State Dept. of Taxation and Finance*, 20 NY3d 586 (2013), nexus was found by that court to exist by way of physically present affiliates. The case relied on the precedent from this Court, *Scripto* and *Tyler Pipe Industries v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); what are often referred to as the "agency nexus" cases. *Cert.* was denied in this case and could be used as a framework for asserting nexus over large marketplace businesses. A

they claim cannot be collected, yet they are curiously reluctant to instantly mitigate the majority of the tax loss.[10]

Petitioner claims that it is out to protect the brick-and-mortar retailers and that its intent is to require big businesses like the Respondents to collect and remit sales and use taxes. In reality, the states are attempting to require small business online merchants, including those brick-and-mortar retailers who also sell online, to collect and remit sales and use taxes, and are refusing to do the same to the biggest online business of all, Amazon.[11] If the Petitioner had any interest in protecting its local businesses from unfair advantages, it would have, by taking actions to compel Amazon to collect tax. The decision to mask its deliberate and ongoing failure to protect local merchants from the unfair tax advantages of online marketplaces such as Amazon is merely a means of

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retroactive application of such rule would seem cruel, but going forward, a holding consistent with New York's ruling in *Overstock* would likely give Petitioner's all they need to collect almost all of the tax they are entitled to. However, the assertion of income tax nexus and the associated burden which is greater than sales tax for small businesses, should still be considered. *See Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 987 N.E. 2d, 621 (N.Y. 2013).

[10] On January 1st, 2018 a Washington State statute went into effect requiring Amazon to collect on 100% of its sales, including the half it claims it is exempt from collecting as a marketplace. Despite the ability to adopt statutory or other remedies based on their present statutory law, Petitioner has chosen to bring this matter before the Court, unnecessarily.

[11] States are fully aware of Amazon's activity as a retailer and have chosen not to enforce the law. http://www.taxanalysts.org/content/news-analysis-amnesty-exposes-rift-among-amazon-marketplace-sellers.

trying to deflect attention away from the fact that it was the states inaction alone that helped fuel what is commonly known as the "retail apocalypse".

2. *Quill*'s physical-presence rule should be upheld. The world of mail order catalogues is essentially history, and since Canadian Mark Fraser's purchase of a broken laser pointer from AuctionWeb in 1995, buyers and sellers from around the world have been granted access to a truly international marketplace. Fulfillment by Amazon, which was introduced to the world as Amazon Fulfillment Web Service in 2008, opened the marketplace even further; for the first time, an interest in selling to the global economy was all a merchant needed in order to sell to the global economy, Amazon handled the rest. Petitioner's present actions, placing undue and unnecessary burdens on interstate commerce, will likely put an end to what most would view as progress; placing impossible burdens on more small businesses, not less. The rule of law is, and should be, physical-presence; a state may only demand a seller collect and remit sales and use tax if the merchant has sufficient nexus.

3. *Quill*'s emphasis on the compliance burden should not be overlooked or diminished. Precedent requires that states cannot levy taxes on a physically present taxpayer with utter disregard for the burden that such taxes impose on interstate commerce. "Undue burdens on interstate commerce may be avoided ... by a case by case evaluation of the actual burdens imposed by particular ... taxes...." *Quill*. The troublesome burdens that the Court in *Bellas Hess* noted could "entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose [taxes]"; *Bellas Hess*; still exist online and in physical

world. Requiring small business online merchants to collect and remit sales tax in the thousands of varied jurisdictions across the nation places an undue burden on interstate commerce, and is therefore unconstitutional.

4. Significantly less burdensome options are available. When the regulation of interstate commerce is necessary, the burden that doing so places on such commerce must be evaluated in light of other less burdensome options. There are less burdensome ways that the states can collect sales and use taxes based on Internet marketplace sales, including holding the few businesses that control the Internet marketplace responsible for collecting such taxes, or simplifying compliance obligations. Other options lie within the hands of the Court.

ARGUMENT

I. PHYSICAL PRESENCE IS NOT THE BARRIER PETITIONER CLAIMS IT TO BE, THEREFORE THIS MATTER SHOULD NOT BE BEFORE THIS COURT.

Fear of disrupting a cozy and dysfunctional relationship with retail giant Amazon, not the Constitution, has prevented the states from collecting tax, and achieving tax parity for both online and offline businesses.[12] In its Petition to the Court, Petitioner claims that "States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike." *Petition for Writ of Certiorari*. The Petitioner goes on to cite its need to "maintain a balanced budget" and its

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[12] *See* Brad Stone, The Everything Store: Jeff Bezos and the Age of Amazon 286-294 (2013)

"revenue shortfalls" as among the reasons that the Court should overturn *Quill*, its holding now giving "internet sellers ... an unfair advantage over their brick-and-mortar rivals."

Claims that the Petitioner is unable to collect taxes from remote sellers are patently false. The Petitioner has all the means necessary to recover most if not all of the taxes they claim to be constitutionally barred from collecting. Petitioner has statutory authority and jurisdiction to place a use tax collection burden on Amazon for all of its sales, including the half of its sales that Amazon claims are exempt due to adhesive "contractual shifts" normally not given any regard by Petitioner or its *amici*, in tax matters. However, when such shifts are tied to jobs and capital investment, states have developed a willingness to turn a blind eye. Even the MTC, an organization that at one point considered offering a network of transfer pricing experts to assist states with complex audits involving the shifting of income via questionable intercompany contracts, claimed to take no issue with Amazon's contractual shifting tactics that blatantly contradicted Amazon's economic realities. As Richard Cram, the MTC's amnesty mastermind explained in an email:[13]

> *"Under Amazon's FBA seller business model, the contractual relationship between Amazon and the online marketplace seller places the responsibility on the online marketplace seller to indicate to Amazon which states the seller has nexus in. Amazon then collects sales/use tax on sales into those states, forwards that*

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[13] Statement taken from email communication between Richard Cram and Counsel for Online Merchants Guild (emphasis mine).

> *collected amount to the seller, and the seller is responsible for registering with the state and filing the appropriate sales/use tax returns with the state. The MTC online marketplace seller voluntary disclosure initiative offers interested online marketplace sellers a way to come into tax compliance while minimizing their back tax liability and also bringing to the participating states revenue from those online marketplace sellers' sales, starting not later than December 1, 2017."*

Suddenly Amazon is being treated by Petitioner and its *amici* as the tax equivalent of Switzerland, acknowledging its "neutrality" simply because Amazon relinquished control of their "tax or not to tax" button to the millions of online merchants, leaving it to the individual to determine their tax collection responsibilities. It is absurd that Amazon, retailer with nexus in every state, could avoid tax collection by way of contractual fiction, especially when all transactions are processed by Amazon, subject to Amazon's terms and conditions, purchased by people who are contractually Amazon's customer and only see Amazon's logo when purchasing products supplied by the online merchant. These are the same observations raised by South Carolina, the one state pursuing Amazon for back taxes, essentially arguing that Amazon's self-serving and adhesive contractual distinctions are meaningless and don't mimic reality.[14] Petitioner and *amici* are unphased by South Carolina's thought leadership with respect to Amazon, not even willing to offer comment

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[14] *See* South Carolina Determination Letter (July 21, 2017) available at http://src.bna.com/rI4.

other than saying each state's law is different. While it may be true that the laws are written differently, their effect when it comes to sales tax is consistent.[15] Nonetheless on January 1, 2018, a Washington State law went into effect requiring Amazon to collect taxes on all of its retail sales, regardless of contractual distinctions. Unfortunately, that has not stopped Washington from aggressively and unconstitutionally burdening small online merchants with eight years of back tax assessments, and retroactively applying laws in support of them. Petitioner and its *amici* have granted Amazon quasi "duty-free" status yet seek to mitigate their unethical decision by burdening hundreds of thousands of individual merchants with tax compliance costs most cannot afford, or seek back taxes because the online merchant did not collect, even though statutorily, constitutionally and practically, it is and was Amazon's responsibility. The absurdity of taxpayers using self-serving "contractual shifts" to

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[15] Mass. Gen. Laws. 64H, Section 1 Definitions. The law defines a sale for sales tax purposes as follows:

"'Sale'" and "'selling'" include (i) any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property or the performance of services for a consideration, in any manner or by any means whatsoever." When an FBA merchant sells a product the transfer of title and possession is completely controlled by Amazon. That didn't stop Massachusetts from scaring online merchants by publicly requiring Amazon to turn over individual merchant data so that Mass. could hunt down individual online merchants. With statutory law that would make Amazon the clear "seller" and even laws that allow the state's tax commissioner to re-assign the tax collection burden in the interests of effectively administering the tax code, it seems odd that the Amazon.com Headquarters finalist and recent recipient of thousands of jobs from Amazon chose this approach. https://www.cnbc.com/2018/01/23/amazon-will-turn-over-third-party-seller-tax-data-to-massachusetts.html

avoid tax has been acknowledged by the Court, stating that:

> "[t]he formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida ... [t]o permit such formal "contractual shifts" to make a constitutional difference would open the gates to a stampede of tax avoidance."

Scripto, Inc. v. *Carson*, 362 U.S. 207, 211 (1960).

Contractual shifts do not constitute some magical change that allows an entity to avoid tax burdens; but for Amazon, the ultimate exception to the rule, the same is not true. MTC and the states have avoided explaining the rationale for this exception and are unwilling to answer to the small business merchants that are being forced out of business by the exception. Perhaps these parties, who claim to be out for the good of the brick and mortar retailer, will respond differently to demands from the Court, as opposed to Meredith the small business owner from New Jersey.[16]

Petitioner and its *amici*'s reluctance to take any meaningful steps to embrace the power of modern technology to streamline the tax burdens on small business in any meaningful way, despite their claims to the contrary, is directly tied to their dealings with Amazon. As the Petitioner and its *amici* are well aware, efficient compliance would shut down the Amazon loophole that Petitioner and its *amici* have been willfully blind to, in exchange for Amazon's jobs

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[16] *See* discussion of MTC meeting below.

and capital investments. California, where Amazon employs 30,000 residents, who was once known by its peers for being an innovator and thought leader when it came to holding taxpayers accountable for tax obligations, has now shown that it can also be an innovator and thought leader for foreign dictatorships too; threatening out of state small business owners with incarceration for taking what is essentially the same legal stance as the Respondents who have been brought before this Court.[17] But incarceration is just one example of California's descent into the abyss of unethical burdens it has placed on interstate commerce.

Presently, as *amici* for the Petitioner, California is shaking down the smallest online merchants for eight years of back taxes, supposedly when Amazon started placing online merchants' inventory in California warehouses. A question this raises is why, if Amazon had a warehouse in California in 2010, is the state that pioneered unitary principles for income tax, only requiring Amazon to collect tax in September of 2012; and why are online merchants being held accountable for taxes back to 2010, when Amazon was never held accountable and only started collecting in 2012? Unfortunately, California's chicanery does not end

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[17] An email to an out of state online merchant sent from California Department of Taxes and Fees Administration employee, sent in March of 2018, stated that "[CDTFA Employee] also wanted to advise [Merchant] that operating unlawfully you can be prosecuted [sic] . . ." referring the merchant to an excerpt of a California law that states, "any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony . . . shall be punished by a fine . . . or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court."

there. In November of 2017, a letter drafted at the request of a state elected official was hand delivered to the California Governor.[18] It was sent on behalf of online merchants explaining how California could collect tax, burden-free, while also asking California to clarify the laws that support their shakedown of small business online merchants for eight years of back taxes. While no clarification was provided, California responded to the letter, three months later in the form of what was essentially a state letter ruling. California claimed it was issued by its in-house tax attorneys, but what it lacked as far as on point substantive analysis, it made up for in an aggressive tone; not usually what you'd expect from a state government. However, what was most surprising about the response was that, a review of the source document, which was sent to merchants in Microsoft Word format, revealed hidden metadata indicating the ruling was prepared by Amazon and copied onto official California letterhead.[19] If the financial harm caused to Petitioner and its *amici* is voluntary, then bringing this matter before the Court is inappropriate, and in the light of recent behavior, it is deceptive.

Actions by Petitioner and its *amici* have harmed hundreds of thousands of small business online merchants, a subset of the over two million merchants active today. The undue influence that Amazon has

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[18] https://www.ecommercechris.com/amazon-fba-sellers-california-sales-tax-letter/

[19] Metadata was in the form of a hidden digital watermark header stating "Amazon Fulfillment Services, Inc." Further, a reporter who had contacted California for comment about the metadata never received a denial from the state. Also, an attempt to submit a FOIA request regarding the matter was denied as it was deemed to be Amazon's confidential taxpayer information.

over the Petitioner and its *amici* has turned governments against their own people, resulted in frivolous claims of unpreventable loss and harm that are currently before the Court, and is itself a burden on interstate commerce that must be answered for, and appropriately addressed. The actions of the Petitioner and its *amici* thus far forecast the future if a ruling by the Court allows the states the freedom to burden interstate commerce even further.

Petitioner's claims that "internet sellers" have an "unfair advantage over their brick-and-mortar rivals" glosses over a crucial point. The unfair advantage was fueled by Petitioner and its *amici's* willingness to look the other way, allowing Amazon to operate "duty-free," both presently and in the past, meanwhile they stand before this Court making statements to the contrary, claiming only a Constitutional remedy can help them. Even Richard Cram of the MTC acknowledged that a substantial amount of Petitioner's sales tax losses were due to statutory, not Constitutional, barriers in an email stating that "[W]hether Amazon should or should not be the one collecting sales/use tax on sales by its third-party sellers...we do not have a position on that. Each state can address that question, depending on how its statutes and regulations define who is required to register and collect its sales/use tax." *See supra*, note 14.

In August of 2017, instead of encouraging states to look within, MTC decided to facilitate the false accusation of hundreds of thousands of small business online merchants for failing to collect and pay sales and income taxes. However, being the "mensches" that they are, MTC, the Petitioner and some of its *amici* offered full or partial tax forgiveness, if they comply with the sales and income tax requirements of more

than twenty states, by Christmas, which entailed providing estimates of years of back taxes. Merchants were given sixty days to submit their application; a pretty cruel window of time to make such a decision and meet the requirements, and it also happened to coincide with the most important time of year for online merchants, planning for the holiday season.[20]

Two months later, in October of 2017, MTC and thirty-one states held an emergency meeting to discuss whether to extend the deadline for online merchants to "take advantage" of amnesty.[21] Although empathetic on its face, the meeting was a farce. The MTC opened the meeting for comment, and countless small business online merchants, listening to the teleconference live, called in to present the human side of the conversation and the real-world consequences of Petitioner's actions. One public commenter, a small merchant from California who lost his job and began selling via Amazon to support his family, literally stated that "this would destroy my business ... I would have to take up a new occupation.... By targeting [small business online merchants] individually, it is only going to create chaos, ruin businesses, and destroy

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[20] The FAQ states that merchants will not protected by PL 86-272, because "an online marketplace seller with inventory in the state . . . would be considered activity in the state beyond the scope of solicitation activity . . .," considering nexus was based solely on Amazon's redistribution of online merchant supplied inventory across Amazon's network distribution centers. Constructive ownership of the inventory is Amazon's, and titled ownership remained with the merchant to facilitate strategic tax planning for Amazon that no other business would ever be allowed to rely on for similar tax collection avoidance strategies. http://www.mtc.gov/Nexus-Program/Online-Marketplace-Seller-Initiative/FAQ.

[21] *See* https://www.youtube.com/watch?v=2fw8A8CDo6U.

what has been a fledgling small business movement in this country...." *See* https://www.youtube.com/watch?v=2fw8A8CDo6U, at approx. 18:30. Another public commenter, from New Jersey, explained his concern with compliance costs. "You are asking me to pay for ... fixed costs that a big corporation has the cash to take care of. I am not a big corporation.... I can't be filing fifty state tax returns, let alone how many municipal tax returns. I'm not set up for that. I'm not a multimillionaire.... There are scores of thousands more like me that are in the same position."[22] Instead of responding or acknowledging those claims, the MTC and the states cut the comment period short, silencing those voices that they now claim they are fighting to save.

Petitioner has chosen to keep Amazon happy by not fixing their law, opting instead for an artificial amnesty program that only placed further burdens on interstate commerce and accomplished nothing. It is the Petitioner's own doing that local retail has suffered for so long, not *Quill*, whose rule of law is operating as intended by at least protecting those Amazon FBA merchants, and other small businesses, that lack a physical presence.

II. *QUILL*'S PHYSICAL-PRESENCE RULE SHOULD BE UPHELD.

1. The facts of this case are analogous to *Quill*, therefore the reasoning and holding from *Quill* apply.

Revisiting *Quill* is unnecessary, as it is not the root cause of any problem the Petitioner claims it to be. If anything, the Court should acknowledge that *Quill* is merely a starting point for analyzing *Complete Auto*

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[22] *See* https://www.youtube.com/watch?v=2fw8A8CDo6U, at approx. 20:37.

Transit Inc. v. Brady, 430 U.S. 274 (1977) first prong, "Substantial Nexus," not the per se substantial nexus threshold Petitioner believes it to be, and that burdens must still be considered even if substantial nexus is established. A ruling in favor of the Petitioner would be premature. The burdens concurrently placed on millions of small businesses at a magnitude exponentially greater than the burdens at issue in *Quill* demonstrate that Petitioner hasn't learned from history, and therefore should be "doomed to repeat it." Until actual evidence demonstrating that states can and will administer the tax without burdening interstate commerce, their freedom to recover tax outside their jurisdiction warrants further restriction, not expansion.

The *amici* sellers strongly urge the Court to recognize the similarities between Quill Corporation and the small business online merchant. Based on Quill Corporation's solicitation of customers in the state, North Dakota argued that Quill Corporation was required to remit taxes on sales to North Dakota customers. Out of concern for "the national economy"; *Quill*; stating that the "negative implication of the Commerce Clause ... bars state regulations that unduly burden interstate commerce"; *Quill*; the Court decided in favor of the taxpayer. The Court reasserted the *Bellas Hess* sales and use tax "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United states mail,'" and in doing so helped the mail order industry continue to exist.

While the mail order industry is virtually nonexistent, today the rise of ecommerce and services such as Fulfillment by Amazon (FBA) have taken its place. Amazon Fulfillment Web Service, originally promoted

as, "allow[ing] merchants to access Amazon.com's world-class fulfillment capabilities through a simple web services interface ... [and] mak[ing] it easy for merchants and developers to programmatically integrate the benefits of Fulfillment by Amazon (FBA) into their own web sites or other sales channels. With FBA, merchants [could] store inventory in Amazon's warehouses and Amazon [would] pick, pack, and ship products directly to merchant's customers." (http://aws.amazon.com/about-aws/whats-new/2008/03/19/announcing-amazon-fulfillment-web-service/).

In reality, online merchants relinquish all control over the selling process once their products are received by the common carrier and sent to one of Amazon's warehouses. It's the Amazon prepared shipping label, not the merchant, that determines which Amazon facility the merchants products are sent to. Once the products arrive at the warehouse they are often redistributed by Amazon to other Amazon warehouse locations throughout the country. It was that act by Amazon, Amazon's redistribution of the goods, that created the absurd nexus "gotcha" that led to California and Washington's scare tactics, and the MTC amnesty program; even though the online merchant no longer physically possesses the good, has no control over unsold or wrongfully returned goods, and is not involved with where the good is sent or stored. *See Marketplace Seller Voluntary Disclosure Initiative, https://www.youtube.com/watch?v=2fw8A8CDo6U,* at approx. 17:43-18:01. The typical online merchant's only connection with a state outside of its home state is a result of Amazon putting products they supplied, and self-serving contractual tagging of the online merchant as the "owner" or "seller," which is odd considering the online merchant has no rights to seek out its customers for future business outside of Amazon,

making the online merchant a retailer exclusively for "tax purposes." This is what the states use to justify scaring a single mom in Oahu, who can choose to be at home with her kids, where she wants to be, thanks to her home-based Amazon business.[23] To think that she now has to fear that she might be going to jail, will lose her business, or will be forever in debt to the Petitioner and its *amici*, is exactly the kind of burdens *Quill* was meant to prevent. Even more egregious is that Petitioner and company could have avoided placing such a horrifying burden on the online merchant in Oahu by enforcing or amending their statutory law requiring one party, Amazon, to collect the taxes that, ironically, Amazon still has to collect any time a merchant decides that they are going to do so. The tax revenue is held by Amazon for two weeks in most cases, however, because Amazon conveniently refers to that as "Tax Calculation" services, they are exempt from their responsibility. It's shameful behavior on the part of every state, except South Carolina, and it is a foreshadow of what's to come if *Quill* ceases to be.

The tax logic that applies to Amazon marketplace is like any other large, physically present retailer. So, in theory, if the states were to uniformly apply the tax law, Target/BestBuy/Walmart could also claim tax exemption too, by way of converting their retail outlets into "marketplaces," on paper, contractually converting their suppliers into "sellers" and putting little disclaimers like "Sold by Quill Corporation" in small print on every product display. Meanwhile, the customer's retail buying experience has not changed. They take products from shelf placing it in their cart, use the same retail checkouts and return products at

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[23] True story, not hypothetical.

the same customer service desk; the substance of the retail shopping process is identical, the only thing that's different is the contractual form. Of course, if a big box retailer claimed exemption due to such a formality no state would ever respect it and their statutory law, as well as *Scripto* supports their ability not to do so. Amazon, a physically present retailer, known for showering states with employment opportunities and warehouses, gets a state sanctioned duty-free pass, facilitating their advantage over local retailers, and if that's not bad enough, Petitioner seeks to place undue burdens on millions of individual merchants, in order to mitigate the effect of their generosity, by bullying small businesses with questionable nexus assertions and unreasonable demands. These actions far exceed the unconstitutional boundaries *Quill* established; the only reason that, barely, prevents Petitioners from placing even more damaging burdens on interstate commerce.

2. Assuming arguendo that the states' taxation goals are in compliance with the Commerce Clause and its implications, compelling the small business online merchant to collect and remit sales and use tax is violative of the Due Process Clause as interpreted and applied in *J. McIntyre Machinery, Ltd.* The small business online merchant has not "purposely availed [her]self of the privilege of conducting activities within the ... State [and has therefore not] invoke[ed] the benefits and protections of its laws." *McIntyre*, quoting *Hanson* v. *Denckla*. "The principal inquiry in cases of this sort is whether the [seller's] activities manifest an intention to submit to the power of a sovereign." *McIntyre*. In the situation described in the preceding section in which the small business online merchant participates in the Internet marketplace via FBA, the small business online merchant has not manifested

such an intention, Amazon has. She has not targeted the forum; *McIntyre*; Amazon has. Regardless of the merchant's knowledge and expectation of Amazon's intentions, the merchant has not acted in any way to allow the state to subject her to tax. In *McIntyre*, the fact that four machines "ended up in New Jersey" was not enough to show that "McIntyre purposefully availed itself of the New Jersey Market." *McIntyre*. Similarly, here, the fact that a merchant's products end up in a state because Amazon directs that they do so does not establish purposeful availment. The state is without power to compel the merchant to collect and remit sales and use tax; to allow the state to do so would violate due process.

III. *QUILL'S* EMPHASIS ON THE COMPLIANCE BURDEN SHOULD NOT BE OVERLOOKED OR DIMINISHED.

The nation's taxing jurisdictions are no closer to being uniform than they were in the early 1990s. The burdens specifically identified by the Court in *Bellas Hess* still exist; tax rates vary, as do allowable exemptions and administrative and record keeping requirements.[24] As the *Bellas Hess* and *Quill* courts recognized, compelling an unequipped entity to collect and remit sales and use taxes throughout the nation's taxing jurisdictions has dire consequences; the small business online merchant, today's mail order house, cannot meet these demands. The *Quill* Court agreed with *Bellas Hess* Court that complying with complicated compliance obligations was enough to render an

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[24] The same was made clear by one of the small business online merchants who voiced his concerns with the compliance burdens to the MTC in October of 2017. *See* https://www.youtube.com/watch?v=2fw8A8CDo6U, at approx. 20:37.

industry obsolete, yet states are now willing to extend such obligations even further, a decade into the past, with total disregard for the impact on the taxpayer and, more constitutionally significant, the interstate markets that taxpayers will no longer be able to operate in.

Petitioner's *amici* refer to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) as the solution for ensuring interstate commerce is protected from undue burdens. We agree and hope the Court will consider *Pike* as it is particularly relevant to the current situation involving our merchants, where undue burden for tax collection is placed, but could be easily mitigated by requiring the platform to collect on any transactions, regardless of whether or not the platform considers itself a retailer under state law. The Washington law that went into effect at the beginning of the year is evidence of the fact that there is no constitutional barrier preventing states from collecting the tax; it's made up. Nevertheless, Washington's removal of a sales tax burden doesn't liberate online merchants from the burdens of its Business and Occupation tax that it believes can be imposed on hundreds of thousands of online merchants based on their products being placed in an Amazon facility in Washington. Therefore, while yes in theory *amici* support a *Pike* balancing approach, its clear based on present actions that Petitioner and its *amici* will not respect it putting unreasonable stress on our nation's, and others', smallest of businesses. As one merchant stated in an email sent at 1:30am: "[It's] [o]ne of those odd nights where I can't stop thinking about [Washington's Assessment and reply brief]."

Washington is also seeking eight years of back taxes from this out of state tax taxpayer, whose only connection to the state is because Amazon decided to put his products in one of their warehouses. What's more chilling about Washington's aggressive behavior is the fact that the taxpayer has emails from the Department of Revenue indicating an Amazon tax executive had the ear of the state's chief tax executive, Vikki Smith, and was advising her on how to handle the taxpayer's case; an obvious conflict of interest since, if the taxpayer were to prevail on statutory grounds, it would mean, implicitly, that it was Amazon that should have been collecting tax, not the taxpayer, meaning Amazon could owe eight years of back taxes not for one, but for every taxpayer who bought product from its marketplace over the last eight years. Thank goodness Washington saw the problem that would cause and decided to act against a Utah small businesses instead of disrupting in-state corporate giants. In a not so surprising twist, the taxpayer's multiple requests to speak with Ms. Smith were denied. Washington like every other state will never apply *Pike* balancing the way it was intended, instead states will use their ability to put the brakes on the wheels of justice to force small business taxpayers into submission.

IV. SIGNIFICANTLY LESS BURDENSOME OPTIONS ARE AVAILABLE.

1. Small business online merchants support each state's need and want to collect all taxes that it is entitled to, whether sales and use, income, or any other tax type. Petitioner and its *amici* can administer their tax while ensuring the burden placed on the small online merchant is proportionate to the scale of their enterprise, they choose not to, even though under

Pike they are required to. When states regulate to affect interstate commerce, "the extent of the burden [imposed on such commerce] that will be tolerated ... [depends] ... [in part] on whether [the local interest involved] could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). In light of its holding in *Pike*, the Court must consider the fact that the Petitioners, whose *amici* raise *Pike* as a constitutional check, have no interest in self-administering such a check, as they are presently placing destructive burdens on interstate commerce. The states' interests in collecting sales and use, income or any other taxes can be better satisfied with a lesser impact on interstate activities, especially now that the technology exists to make full compliance effortless for the online merchant of any size. Yet, no solution purported by the Petitioner offers meaningful reduction of the multistate tax compliance burden to a manageable level, for small businesses.

2. Petitioner and its *amici* have the option of seeking tax collection from the marketplace providers and seek collection from large remote vendors following the line of reasoning New York followed which included the Court's prior decisions *Scripto and Tyler Pipe*. Quid pro quo agreements with Amazon, signing the state's rights away to collect tax, despite being questionable behavior in itself, does not justify the states placing undue burdens on interstate commerce. An example of such an agreement was made obvious due to a comment made by the Mississippi Department of Revenue in response to a local news inquiry on the subject stating that:[25] "Any sales made

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[25] http://www.msnewsnow.com/story/34452080/mississippi-man-finds-amazon-sales-tax-loophole Given that the states are facilitating what the Petitioner, in its petition, claims is an unfair

by a third-party independent seller, even though made through the Amazon marketplace, are not covered under the agreement." The question is, why not?

3. When it comes to administering the tax law, modern technology has turned what was impossible in 1992, to practical in 2018, but Petitioner and its *amici* have refused to embrace any such modernization. Whether out of fear that uniform tax collection might aggravate their corporate benefactor, or simply an inability of Petitioner and *amici* to function cohesively, the supposed purpose of forming the MTC in 1967, no progress has been made to streamline the process of use tax collection and remittance, or any other tax for that matter. Having done so would allow small businesses to collect use tax and even pay income tax without having to forgo twice their annual income to tax advisors, just so they can comply with the same tax filing burdens as Walmart. With Application Protocol Interfaces the framework was in place for the MTC to work with Amazon and eBay to create fast track filing options for online merchants. However, the MTC chose amnesty instead.

4. Petitioner claims use tax enforcement intrastate is impractical, but technology implemented by the states in a non-tax context would indicate otherwise.[26] What was impractical in 1992, is no longer

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advantage that websites have over local retail, is it appropriate for the Petitioner to point to this competitive price advantage, which is really due to selective enforcement, as a reason why the Court must intervene?

[26] In 2017, New York City bridges modernized toll collections; removing cash toll booths and replacing them with toll by mail. Guaranteed cash was abandoned in favor of having to seek toll payment by mail from individual motorists domiciled anywhere

impractical in 2018. Petitioner has jurisdiction to impose a tax on its own citizens, and therefore could enforce the use tax intrastate. Connecticut has taken such steps, placing pressure on Newegg, Inc. to provide the state with all data related to customer purchases in Connecticut, so that Connecticut can pursue back taxes from its own residents who failed to pay a tax that has probably never been meaningfully enforced since it came into existence. Nonetheless, according to Connecticut tax Commissioner Kevin Sullivan, companies are willing to "squeal on our customers and [Connecticut] can beat up on them ... The people who sold to them have ratted them out."[27] Connecticut might be on the right track, but they've also overreached; requesting item specific data from Newegg. Accordingly, while Connecticut can now easily figure out the use tax that Mr. Jones owes, it can also commend Mr. Jones for his choice in diamonds for Mrs. Jones, and his choice in rubies for his mistress. Considering that there are less invasive means to acquire the data necessary to determine a use tax liability, perhaps it's time for the Court to consider whether the claim of impracticality is still valid in 2018.

5. If physical presence is abandoned, then we ask this Court to offer federal courts guidance as to when the Tax Injunction Act is considered appropriate if states weaponize their slow wheels of justice. 28 U.S.C. § 1341.[28]

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in the U.S., Canada and Mexico; a daunting task compared to using website data to generate a tax bill to be enforced intrastate.

[27] http://www.courant.com/politics/hc-pol-online-sales-tax-20180214-story.html

[28] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a

CONCLUSION

The experience of our merchants over the last year foreshadow the burdens Petitioner and its *amici* will place on both the national and global economy, if granted further freedom to act without clear constitutional boundaries. States have all they need to accomplish what they claim they cannot; removing physical presence will only allow Petitioner more freedom to burden interstate commerce without regard for the consequences. Therefore, the Court should rule in favor of the Respondent.

Respectfully submitted,

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plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.